Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-753

In The
SUPREME COURT
Of The UNITED STATES
Winter Term, 1982

FRANKLIN COUNTY SHERIFF'S OFFICE
Petitioner,

v.

BETTY SELLERS
Complainant/Respondent,

and

WASHINGTON STATE HUMAN RIGHTS
COMMISSION
Respondent.

On Appeal from the Supreme Court
of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

MORTON M. TYTLER
Sr. Asst. Atty. General
Human Rights Division
5th Floor
Highways-Licenses Bldg.
Olympia, WA 98504
206/753-1564

NO. 82-753

In The
SUPREME COURT
Of The UNITED STATES
Winter Term, 1982

FRANKLIN COUNTY SHERIFF'S OFFICE
Petitioner,

v.

BETTY SELLERS
Complainant/Respondent,

and

WASHINGTON STATE HUMAN RIGHTS
COMMISSION
Respondent.

On Appeal from the Supreme Court
of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

MORTON M. TYTLER
Sr. Asst. Atty. General
Human Rights Division
5th Floor
Highways-Licenses Bldg.
Olympia, WA 98504
206/753-1564

I. INACCURACIES IN QUESTIONS PRESENTED

The Petitioner's statement of questions presented for review contains the following factual inaccuracies:

A. The tribunal was not "operated" by the Washington State Human Rights Commission.

In Question (i), page 2, of the Petition for Writ of Certioari, the Petitioner states that the administrative hearing tribunal which initially heard this case "was appointed and operated by the Washington State Human Rights Commission."

It is a minor point, but the tribunal was appointed by the Chairperson of the Commission, acting alone. RCW 49.60.250 (prior to enactment of Chapter 67, Laws of

1981), Appendix 15 to Petition for Writ of Certioari, page 1. The Washington State Human Rights Commission is a five-member body. RCW 49.60.050. (The Commission was previously named the "Washington State Board Against Discrimination," RCW 49.60.051, and is still referred to as the "board" in the text of the law against discrimination, Chapter 49.60 RCW.)

The tribunal was not "operated" by the Commission. Tribunals are wholly free of control or influence by the Commission, and are entities separate from the Commission. See Washington Attorney General Letter Opinion 1977 No. 54, Appendix A to this brief, at pages 9 to 14. The Commission does not even have the power to review and

revise the tribunal's decision. The tribunal's decision is final, RCW 49.60.250, subject only to review by courts. See Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 322, 646 P.2d 113, 115-116 (1982), Part I, Appendix 4 to the Petition for Writ of Certiorari, pages 5-10.

B. Tribunals may not act on private knowledge of the facts.

In Question (iii).b., page 2, of the Petition, the Petitioner states that tribunal members "may have private knowledge of the facts."

Tribunal members should not have private knowledge of the facts, and use by a tribunal member of private knowledge of

the facts in deciding the case would be reversible error. RCW 49.60.250 specifies:

> "No member or employee of the [Commission] who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case."

The state administrative procedure act, which governed the hearing, provides:

> "All evidence, including but not limited to records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case."

RCW 34.04.100(2). These laws were implemented by the rules of procedure that

governed this case:

> "Evaluation of Evidence. The tribunal's findings of fact shall be based exclusively on the evidence and on matters officially noticed, but the tribunal members may utilize their experience, technical competence, and specialized knowledge in evaluating the evidence."

WAC 162-08-292(6).

There has never been any suggestion that the tribunal that heard this case had any private knowledge of the facts of the case.

C. Tribunal members could not be dismissed after they had made a ruling involving discretion.

In Question (iii).c., pages 2-3, of the Petition, the Petitioner states that

tribunal members "can be dismissed by the Human Rights Commission."

Tribunal members could not be removed from office except in the following circumstances:

1. A tribunal member could be removed for cause on motion of a party if the motion was made within ten days after the party was notified of the tribunal member's appointment and if the tribunal member had not made any ruling involving discretion. WAC 162-08-215 (Appendix B), particularly paragraphs (1), (2) and (7).

2. The order appointing the three tribunal members could be set aside for procedural error on motion made by an aggrieved party within 15 days after the

party had been served with notice of hearing. WAC 162-08-217 (Appendix C).

Under Washington law, parties must be accorded at least 20 days notice of an administrative hearing. RCW 34.04.090(1).[1]

II. CORRECTION TO PARTIES BELOW

On page 3 of the Petition for Writ of Certiorari, Betty Sellers is listed as a party "Complainant, Respondent."

Betty Sellers has never had the status of a party to this case at any level.

---

1 RCW 34.04.090(1) provides: "In any contested case all parties shall be afforded an opportunity for hearing after not less than twenty days' notice;..." This is part of the Washington Administrative Procedure Act, Chapter 34.04 RCW, which applies to this hearing and all others by state agencies that are not specifically exempted. See RCW 34.04.010, 34.04.150.

Mrs. Sellers filed the administrative complaint that commenced the process of administrative fact finding and conciliation, under RCW 49.60.230 and .240. The judicial stage of this case began with the tribunal hearing under RCW 49.60.250. Washington law provides that at the tribunal hearing:

> "The case in support of the complaint shall be presented at the hearing by counsel for the [commission]: Provided, That the complainant may retain independent counsel and submit testimony and be fully heard."

RCW 49.60.250, second paragraph, Appendix 15 to Petition for Writ of Certiorari, page 2.

By Commission rule, a complainant who wants to participate in a tribunal hearing must file a notice of independent appearance. WAC 162-08-261 (Appendix D). Only a complainant who has filed a notice of independent appearance has the status of a party. WAC 162-08-288(1).[2] Betty Sellers did not appear independently. She was satisfied to have the case presented by the Attorney General, as counsel for the Commission. The Attorney General is not counsel for Betty Sellers.

---

2 WAC 162-08-288(1) provides: "The parties to the hearing shall be the commission, through its counsel presenting the case in support of the complaint, a complainant who has filed a notice of independent appearance under WAC 162-08-261,..."

III. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

Table of Contents

		Page
I.	INACCURACIES IN QUESTIONS PRESENTED	
	A. The tribunal was not "operated" by the Washington State Human Rights Commission. . . .	1
	B. Tribunals may not act on private knowledge of the facts.	3
	C. Tribunal members could not be dismissed after they had made a ruling involving discretion . .	5
II.	CORRECTION TO PARTIES BELOW.	7
III.	TABLE OF CONTENTS AND TABLE OF AUTHORITIES	9
IV.	CORRECTION TO STATEMENT OF THE CASE.	14

V. REASONS WHY THE WRIT SHOULD BE DENIED

A. The County's due process argument is unmeritorious on its face. 15

B. The statutory provisions alleged to be unconstitutional are no longer in effect. There is no public interest in determining the constitutionality of superseded law 17

C. Franklin County is a political subdivision of the state of Washington and as such has no right to assert the due process clause of the Fourteenth Amendment against the state government 19

VI. CONCLUSION 23

AGLO 1977 No. 54 . . . . . App. A

WAC 162-08-215 . . . . . App. B

WAC 162-08-217 . . . . . App. C

WAC 162-08-261 . . . . . App. D

Table of Authorities

Page

Cases

City of Mountlake Terrace v. Wilson, 15 Wn.App. 392, 549 P.2d 497 (1972) 22

Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn., 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976) 16

Kitsap County v. City of Bremerton, 46 Wn.2d 362, 281 P.2d 841, (1955). 22

Kremer v. Chemical Construction Corp., ___ U.S. ___, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982). . . . 16

Moses Lake School District No. 161 v. Big Bend Community College, 81 Wn.2d 551, 503 P.2d 86, (1972) 22

Rody v. Hollis, 81 Wn.2d 88, 500 P.2d 97 (1972). 16

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 77 L.Ed. 1015, 53 S.Ct. 431 (1933). 22

Statutes

RCW 34.04.090(1) 7

RCW 34.04.100(2) 4

RCW 49.60.050. 2

RCW 49.60.051. 2

RCW 49.60.230. 8

RCW 49.60.240. 8

RCW 49.60.250. . . . . 1, 3, 4, 8, 19

WAC 162-08-215 (App. B). 6

WAC 162-08-217 (App. C). 7

WAC 162-08-261 (App. D). 9

WAC 162-08-288(1). 9

WAC 162-08-292(6). 5

Other Authority

AGLO 1977 No. 54 (App. A). 2

Washington Constitution,
Article XI, § 1 20

IV. CORRECTION TO STATEMENT OF THE CASE

On page 10 of the Petition for Writ of Certiorari, the Petitioner inaccurately asserts: "The Washington State Human Rights Commission commenced action before itself the Washington State Human Rights Commission."

This quasi-judicial proceeding was commenced by the Human Rights Commission before the hearing tribunal. As we have already pointed out, supra, parts I.A and

C, pages 1 and 5, the tribunal is an entity separate in law and in fact from the Commission.

V. REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because (A) the County's argument is unmeritorious on its face, (B) the state law that the County objects to is no longer in effect, and (C) Franklin County is not entitled to assert the due process clause of the Fourteenth Amendment against the State of Washington.

A. The County's due process argument is unmeritorious on its face.

The Washington Supreme Court responded to the County's due process argument simply by stating that the court had upheld the constitutionality of the tribunal system in

a prior case, Rody v. Hollis, 81 Wn.2d 88, 500 P.2d 97 (1972).[3] In the Rody case, the appellants were private individuals who had standing to raise the due process issue. The County has cited no case from any jurisdiction to the contrary of Rody, and we know of none. In addition, we note that this court has recently held that the similar system of administrative adjudication in New York satisfies due process of law. Kremer v. Chemical Construction Corp., ___ U.S. ___, 72 L.Ed.2d 262, 281-282, 102 S.Ct. 1883, 1898-1899 (1982). See also Hortonville Joint School District No. 1 v. Hortonville

3 97 Wn.2d at 331, 646 P.2d at 120, Appendix 4 to Petition, pages 27-28, text at footnote 3.

Ed. Assn., 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976) (due process not denied because hearing on disciplining teachers was before same school board that initiated the disciplinary action).

The County's argument is unmeritorious on its face.

B. The statutory provisions alleged to be unconstitutional are no longer in effect. There is no public interest in determining the constitutionality of superseded law.

In rejecting the County's due process argument, the Washington Supreme Court commented:

> "We note that the 1981 legislature has eliminated the provisions that form the basis of

> the County's objections. An administrative law judge appointed by the chief administrative law judge has been substituted for the hearing tribunal appointed by the chairperson of the Commission. Uniform procedure rules promulgated by the chief administrative law judge will supersede Human Rights Commission regulations governing hearing procedures. These statutes will become fully effective on July 1, 1982."

97 Wn.2d at 331, 646 P.2d at 120, Appendix 4 to Petition, page 28, footnote 3. (Citations omitted.)

Washington's new independent Office of Administrative Hearings operates generally to provide administrative law judges for conducting hearings and making proposals for decisions, leaving final decisions to be made by the administering agencies. For

hearings conducted under the law against discrimination, however, the administrative law judge will make the final administrative decision, just as the hearing tribunal did previously. See RCW 49.60.250 as amended in 1981, Appendix 16 to Petition, and our brief, above, part I.A, pages 1 to 3.

There is no public interest in determining the constitutionality of the superseded state law.

C. Franklin County is a political subdivision of the state of Washington and as such has no right to assert the due process clause of the Fourteenth Amendment against the state government.

Franklin County is a political

subdivision of the state of Washington.[4]

The only issue raised in the Petitioner's questions presented for review is whether the state's hearing tribunal system denied the County due process of law under the Fourteenth Amendment of the United States Constitution. Petition for

---

4 Washington Constitution, Article XI, §1, reads:

> "Existing counties recognized. The several counties of the Territory of Washington existing at the time of the adoption of this Constitution are hereby recognized as legal subdivisions of this state."

Franklin County was constituted by statute of the Territory of Washington, now codified as RCW 36.04.110: "Franklin county shall consist of the territory bounded as follows..."

Writ of Certiorari, pages 1-3. The County's quarrel is basically with the state legislature, which commanded that the tribunal be appointed and constituted the way it was in this case. Now that the state legislature has changed the law to provide for hearings before administrative law judges not appointed by the prosecuting state agency, the County considers that its "war was won." Petition for Writ of Certiorari, page 13.

The rule of law that disposes of this case is:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 77 L.Ed. 1015, 1020, 53 S.Ct. 431, 432 (1933).

Nothing in Washington state law empowers a county or other municipal corporation to assert federal constitutional rights against the state. See Moses Lake School District No. 161 v. Big Bend Community College, 81 Wn.2d 551, 557, 503 P.2d 86, 91, (1972); Kitsap County v. City of Bremerton, 46 Wn.2d 362, 366, 281 P.2d 841, 844-846 (1955); City of Mountlake Terrace v. Wilson, 15 Wn.App. 392, 549 P.2d 497 (1976).

Franklin County has not been denied any rights, and it has no standing to

litigate the constitutional rights of others.

VI. CONCLUSION

The Petition for Writ of Certiorari should be denied.

DATED this 29th day of November, 1982.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

Morton M. Tytler
Sr. Asst. Atty. General
Human Rights Division
5th Floor
Highways-Licenses Bldg.
Olympia, WA 98504
206/753-1564

OFFICE OF THE ATTORNEY GENERAL

Slade Gorton, Attorney General
Temple of Justice
Olympia, Washington 98504

OFFICES AND OFFICERS--STATE--
WASHINGTON STATE HUMAN RIGHTS COMMISSION--COMPENSATION FOR SERVICE AS MEMBERS OF HEARING TRIBUNAL

The Washington State Human Rights Commission has the power to compensate persons for service as members of hearing tribunals appointed under the law against discrimination, including members of the commission itself who serve as members of a hearing tribunal in accordance with RCW 49.60.250. However, because of Article III, § 1, (Amendment 54) of the state constitution, the compensation of tribunal members who are also commissioners cannot be increased during their respective terms of office as members of the Human Rights Commission.

- - - - - - - - - - -

November 29, 1977

Honorable Bill W. Hilliard
Executive Secretary
Human Rights Commission
402 Evergreen Plaza Building
Olympia, Washington 98504

Cite as:
AGLO 1977 No. 54

Dear Sir:

By letter previously acknowledged you have requested an opinion of this office on the following questions:

> "1. Does the Washington State Human Rights Commission have the power to compensate persons for service as members of hearing tribunals appointed under the law against discrimination?
>
> "2. If so, can this include members of the commission who serve as members of a hearing tribunal?
>
> "3. Does the executive conflict of interest act, chapter 42.18 RCW, or other law, prevent commissioners from being compensated for service as members of the hearing tribunals?"

We answer your first two questions in the affirmative and your third in the manner set out in our alanysis.

ANALYSIS

By its enactment of the law against discrimination, chapter 49.60 RCW, the legislature created the Washington State Human Rights Commission and gave it "general jurisdiction and power"[1] to eliminate discrimination and prevent unfair practices as defined in the law.[2] One of the authorized means of doing this

---

1 See RCW 49.60.010.

2 See RCW 49.60.175-.223.

is to process complaints of unfair practices. If a complaint is not dismissed for lack of "reasonable cause" after investigation or is not settled through conciliation it is then to be administratively adjudicated before a three-member hearing tribunal appointed by the chairman of the commission. This tribunal is to be composed either of "members of the [commission][3] or of a panel of hearing examiners." RCW 49.60.250. In practice, however, you have advised us that:

> ". . . hearing tribunals have been composed of citizen volunteers with commissioners occasionally serving. . . ."

In addition you have informed us that:

> "Tribunal members have been paid per diem (subsistence) and travel expenses pursuant to general statutes (RCW 43.03.050 and .060) but have never been compensated. The reason why tribunal members have never been compensated has been lack of funds for this purpose, not, in the view of the Commission, lack of authority."

---

3 The name of the agency was changed from Washington State Board Against Discrimination to Washington State Human Rights Commission in 1971, RCW 49.60.251, but throughout the text of the chapter it is still called the "board." For clarity, we have substituted "commission" in quotations from the chapter.

In response to a request from the commission, however, the 1977 legislature included funds for compensating tribunal members in the state budget for the 1977-79 biennium. The commission, then, in July, adopted the following regulation:

> "WAC 162-08-212 COMPENSATION AND EXPENSES OF TRIBUNAL MEMBERS. (1) Compensation. Tribunal chairpersons shall be compensated for their services at the rate of $25.00 per hour and tribunal members other than the chairperson shall be compensated at the rate of $15.00 per hour. Alternate tribunal members shall be compensated at the rate of $15.00 per hour for any time in attendance with the tribunal at the direction of the chairperson of the commission."

Question (1):

Your first question is whether the commission is correct in its belief that it has the power to compensate tribunal members. The governing statute, in our opinion, is RCW 49.60.120 which provides, in material part, as follows:

> "The [commission] . . . shall have the functions, powers and duties:
>
> "(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

". . ." (Emphasis supplied)

An initial question is whether RCW 49.60.120(1), supra, applies at all to hearing tribunal members because of the fact that under RCW 49.60.250 they are appointed by the chairman of the commission, acting alone, and not by the whole commission. A negative answer to that question, however, would render meaningless the word "examiners"[4] and would be

---

4 We are unclear as to the significance of the title "chief examiner" in RCW 49.60.120(1). In context, the position would seem to be permanent (or of indefinite duration) like that of the executive secretary. But tribunal members are appointed for each case separately. See, RCW 49.60.250, discussed below. Possibly the statute anticipates the day when some or all of the panel of hearing examiners from which tribunal members can be appointed are regular salaried personnel and the chief examiner is the chief of the pool of potential tribunal members. We need not resolve this question here, however, because we have concluded that the language of RCW 49.60.120(1) is broad enough to cover tribunal members, however they are designated.

contrary to the administrative and legislative understanding next discussed. We therefore reject such an interpretation which, of course, would require the conclusion that no tribunal members can be compensated, whether or not they are also members of the commission.

Any doubt that we might otherwise have as to the adequacy of RCW 49.60.120 (1) to authorize the compensation of tribunal members is removed by two facts: First, the commission's regulation (WAC 162.08.212, supra) is itself an authoritative ruling on the point by the agency with statutory authority to adopt rules to carry out the provisions of the law against discrimination. RCW 49.60.120(3). See also, Lindsay v. City of Seattle, 86 Wn.2d 698 at 711-712, 548 P.2d 320 at 329 (1976); cf. AGO 1976 No. 17. Second, our review of the appropriate budget documents confirms your assertion that the legislature did intend to provide the commission with funds to compensate hearing tribunals this biennium.[5] We therefore answer your first question in the affirmative. The amount of compensation to be paid is to be fixed by the commission, within the limitations of its appropriation.

---

5 The commission's request for funds for this purpose is on pages 4, 5 and 20 of its General Justification Materials in support of its budget request for 1977-79. The Governor's 1977-79 proposed budget on pages 504-55 included $112,800 for "reimbursements of hearing tribunal members" and explained that

Question (2):

Your second question is whether the power to compensate hearing tribunal members includes members of the Human Rights Commission itself who serve as tribunal members; i.e., whether that power was intended by the legislature to extend to all tribunal members or

---

> ". . . hearings have been held in the past through volunteer services of at least one attorney and two other individuals per hearing. But the large number of hearings currently being held has created difficulties in recruiting free services, and reimbursement for hearing members is also proposed."

The word "reimbursement" must mean compensation because tribunal members have always been reimbursed for expenses and the $112,800 figure is far beyond what would be needed only for expenses of the number of tribunals projected. The final budget adopted by the legislature was not the same as the proposal but nothing in the record indicates an intention entirely to eliminate this or any other item.

only to those tribunal members who are not commissioners.[6]

Once again the statute on appointments and compensation (RCW 49.60.120, supra) reads as follows:

> "The [commission] . . . shall have the functions, powers and duties:
>
> "(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.
>
> ". . ." (Emphasis supplied)

The statute does not authorize the human rights commissioners to compensate themselves as commissioners. Commissioners do not appoint themselves; they are appointed by the Governor. RCW 49.60.050. Nor has the legislature provided directly for the compensation of commissioners. They are authorized subsistence and travel expenses only. RCW 49.60.070. Therefore, it necessarily follows that

---

6 Possible limitations on the power of the legislature to authorize the compensation of commissioners who serve as tribunal members are addressed in our response to question (3), below.

the commissioners, as such, serve without compensation. But the question presented is whether they may nevertheless be compensated when, as authorized by RCW 49.60.250, supra, they serve as members of a hearing tribunal.

The first issue to be considered is whether the word "examiners" in RCW 49.60.120(1) is tied only to the term "hearing examiners" in RCW 49.60.250, thus manifesting an intention to exclude from compensation those tribunal members who are commissioners. RCW 49.60.250 says that:

". . . The chairman of the [commission] . . . shall thereupon appoint a hearing tribunal of three persons, who shall be members of the [commission] . . . or a panel of hearing examiners . . ."

However, the authority to compensate extends to "other employees and agents," as well as to examiners and the other named positions and classes of appointees. The literal meaning of RCW 49.60.120(1), supra, as we have already indicated, is that the commission can compensate all persons whom it can appoint. And, as we have already concluded, this includes hearing tribunal members (reserving for the moment the status of those who are commissioners), although tribunal members are appointed by the chairman of the commission, acting alone.

We turn, then, to the more crucial inquiry which, as we view it, is whether commissioners perform a separate function when they serve as tribunal members. Or,

instead, is their performance as tribunal members merely an exercise of their functions as human rights commissioners? The answer to this question requires a somewhat more detailed examination of the nature of a hearing tribunal and its relationship to the commission.[7]

The following language from RCW 49.60.250[8] is all that the law against discrimination says about the appointment of hearing tribunals:

---

7 In this inquiry we look at the tribunal as a whole, rather than to the position of individual tribunal member. This is so because the tribunal is a deliberative body and acts as a whole, and because tribunal members appointed from the pool of commissioners have no status within the tribunal different from that of tribunal members appointed from the panel of hearing examiners.

8 The text of the statute quoted in this opinion is actually from the session law, § 18, chapter 37, Laws of 1957. The Revised Code of Washington erroneously omits the comma after "examiners."

". . . The chairman of the [commission] . . . shall thereupon appoint a hearing tribunal of three persons, who shall be members of the [commission] . . . or a panel of hearing examiners, acting in the name of the [commission] . . . , to hear the complaint and shall cause to be issued and served in the name of the [commission] . . . a written notice . . . requiring the respondent to answer the charges of the complaint at a hearing before such tribunal, at a time and place to be specified in such notice.

". . . No member or employee of the [commission] who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. . . ."

From this we see that:

(1) A hearing tribunal "act[s] in the name of the [commission]."

(2) Commissioners are not automatically tribunal members; they must be appointed to the position.

(3) Commissioners cannot be appointed to a tribunal by the commission, or by themselves individually. Tribunal members are appointed by the chairman of the commission. The chairman is not

eligible to serve as a tribunal member because he or she also causes the notice of hearing to be issued.

(4) Commissioners have no duty to serve as tribunal members; they are simply eligible for appointment.

(5) It is unlawful for a commissioner who has not been appointed to a tribunal to participate in the deliberations of the tribunal, or to participate in the hearing except as a witness.

The functions of a hearing tribunal are then spelled out in later paragraphs of RCW 49.60.250 as follows:

> ". . .
>
> "If, upon all the evidence, the tribunal finds that the respondent has engaged in any unfair practice it shall state its findings of fact and shall issue and file with the [commission] . . . and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the tribunal, will effectuate the purposes of this chapter, and including a requirement for report of the matter on compliance.

Appendix A, page 12.

"If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint.

". . ." (Emphasis supplied)

Thus, in summary, the tribunal determines issues of fact, applies the law, judges whether unfair practices have been committed, and issues an order disposing of the case. The tribunal exercises its own discretion as to the appropriate remedy when unfair practices are found. The order of a tribunal is issued to the parties and filed with the commission. Thus, the tribunal's product is not the commission's document until it is filed with the commission.

The rules of the commission (chapter 162-08 WAC) also bear upon the functions of a tribunal. Thus, we note that tribunal members can be removed only for cause on motion of a party made before the tribunal has made any ruling involving discretion. WAC 162-08-215, -217. The rules also specify that the commission is a party to the hearing before the tribunal.[9]

---

9 WAC 162-08-288(1) says:

"The parties to the [tribunal] hearing shall be the commission, through its counsel presenting the case in support of the complaint, . . ."

This is so because RCW 49.60.250 provides, in its second paragraph:

> ". . . The case in support of the complaint shall be presented at the hearing by counsel for the [commission] . . . :"

The commission is not empowered to review or revise the decision or order of the hearing tribunal. Instead, appeal from a tribunal order is to the superior court under the administrative procedure act, RCW 34.04.130.

From all of this it appears that a hearing tribunal, once appointed, exists independently of the commission and its members and is not subject to any direction or correction by them. We therefore conclude that the position of hearing tribunal member is separate from the position of human rights commissioner.

Commissioners are eligible for appointment as tribunal members, but they are under no duty to accept the appointment. When commissioners serve as tribunal members their actions are those of the tribunal and not of the Human Rights Commission.[10] Accordingly, it follows that the compensation of a person

---

10 This is not to say that commissioners when serving as tribunal members, may not use their specialized knowledge gained as commissioners. See RCW 34.04.100(4). We presume that the legislature specified that commissioners may be appointed as tribunal members so that their special

serving as a hearing tribunal member should be determined for that position without regard to whether the person is compensated for a separate office held at the same time. And, therefore, it is our opinion that the authority to compensate hearing tribunal members for their service as such may include commissioners serving as tribunal members to the same extent as other tribunal members are now compensated under WAC 162-08-212, supra.

Question (3):

Turning to your third question, we first find nothing in the executive conflict of interest law (chapter 42.18 RCW) which would in any way prevent the payment of compensation to human rights commissioners for their service as hearing tribunal members.

It is most certainly true that this law does prohibit certain conflicts of interest in the executive branch of state government. Moreover, both the Human Rights Commission and its hearing tribunals are "agencies" covered by the act. See RCW 42.18.030. And, under the special definition in RCW 42.18.130, both the commissioners themselves and human rights tribunal members are "state employees" for purposes of the act. However, the executive conflict of interest act does not prevent the service of commissioners as tribunal members.

---

knowledge may be used by them and may be made available to other tribunal members.

This, as we have seen, is expressly authorized by RCW 49.60.250. In addition, an employee's interest in his or her own compensation from the state itself is simply not the kind of interest that this act was intended to regulate. See RCW 42.18.190, 42.18.010.

There is, however, another "law" that could prevent, temporarily, the compensation of hearing tribunal members who are commissioners. We have reference to the constitutional prohibition against raising the compensation of certain officers during their terms of office. Washington Constitution, Article III, § 1, (Amendment 54) reads as follows:

> "The compensation of all elective and appointive state, county, and municipal officers who do not fix their own compensation, . . . may be increased during their terms of office to the end that such officers and judges shall each severally receive compensation for their services in accordance with the law in effect at the time the services are being rendered.
>
> "The provisions of section 25 of Article II (Amendment 35), . . . insofar as they are inconsistent herewith are hereby repealed." (Emphasis supplied)

The referenced Article II, § 25 says:

> ". . . nor shall the compensation of any public officer be increased or diminished during his term in office. . . ."

The effect of this constitutional provision is thus to limit the former general prohibition against raising the compensation of a public officer during his or her term so that it now applies only to officers who "fix their own compensation."

Article II, § 25 (as now limited by Amendment 54) applies to all state officers, not just to legislators. City of Everett v. Johnson, 37 Wn.2d 505, 224 P.2d 617 (1950). Also, providing compensation for the first time for an office that was previously uncompensated is an "increase" in compensation for purposes of the constitutional provision. State ex rel. Livingston v. Ayer, 23 Wn.2d 578, 161 P.2d 429 (1945). Adding new duties does not alone justify increasing the compensation for an office. AGO 53-55-137. An officer is covered by the prohibition if he or she is a voting member of a body of officers who fix the compensation. AGO 1968 No. 36. The courts have not hesitated to strike down schemes, including the creation of dual offices, that were designed to get around the prohibition. State ex rel. Troy v. Yelle, 27 Wn.2d 99, 176 P.2d 459 (1947); State ex rel. Livingston v. Ayer, 23 Wn.2d 578, 161 P.2d 429 (1945).

We do not see in the present circumstances any element of subterfuge to avoid the effect of the foregoing constitutional prohibition against increasing compensation during a term of office. As we understand it, the purpose of the commissioners and the legislature in now providing compensation for tribunal members was to insure an

adequate supply of tribunal members who are not commissioners. The issue is simply whether the constitution prevents tribunal members who are commissioners from receiving the new compensation during their respective terms of office as commissioners because they are members of the same body which fixed the compensation.

Tribunal members as such do not fix their own compensation, but when a tribunal member is also a commissioner that person, as a commissioner, has the authority to fix his or her compensation as a tribunal member. The question thus posed is whether the constitutional prohibition in question is sufficiently broad to include the authority of the individual as a member of a separate body to participate in fixing his or her own compensation as a tribunal member; or whether it should be construed narrowly to include only the compensation-fixing authority of the office to which the compensation is attached. This precise point has never been addressed by the Washington courts or by our office. Nor are we aware of any authority from other states on the question because few states, if any, have a constitutional salary increase limitation such as ours that applies only to officers who fix their own compensation.

Our only guidance, therefore, is the spirit with which the salary limitation provisions have been applied by our courts. Again, that spirit has been one of extraordinary strictness; i.e., taking a broad view of the prohibition and a strict or narrow view of the exception. The Washington court has even discarded the usual presumptions of the constitutionality

of statutes and of the good faith of legislators and has overturned statutes on the basis of the apparent motive of the legislators. Troy and Livingston, supra. In view of this history our best judgment is that the court will take the stricter of the two possible constructions of the term "officers who do not fix their own compensation;" i.e., that the prohibition broadly applies to the authority of a person to fix his or her own compensation whether the compensation is for the office empowered to fix the compensation or for a separate office held by that person. We therefore conclude that the compensation of tribunal members who are also commissioners is subject to the quoted clause of Article II, § 25, supra, and cannot be increased during the person's term of office as a commissioner.[11] Cf. AGO 53-55-137.

---

11 Thus, for example, a human rights commissioner whose current five-year term (see, RCW 49.60.060) began in 1973 will not be able to draw compensation for service as a tribunal member under WAC 162-08-212, supra (which, as above noted, was adopted in July, 1977) until 1978, after that term ends, etc.

We trust that the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

/s/
MORTON M. TYTLER
Senior Assistant Attorney General

mg

WAC 162-08-215 Removal of tribunal members for cause. (1) Motion Authorized. Any party or attorney for a party may move for the removal of one or more tribunal members or alternates for cause as provided in this section.

(2) Time for Filing. The motion must be filed with the clerk within ten days after the notice of hearing was served on the moving party, except that a motion to remove a tribunal member who has been appointed after the notice of hearing has been served may be filed within ten days after notice of appointment of that tribunal member has been received by the moving party.

(3) To Whom Directed. The motion shall be directed to the chairperson of the commission and filed with the clerk.

(4) Contents of Motion; Affidavits. The motion must state the reason why removal is requested and it must be supported by affidavits that establish the factual basis for the motion, unless the factual basis is of record in the case or is already known to the chairperson. Affidavits must be made on personal knowledge, must set forth facts that are admissible in evidence in an administrative hearing, and must show affirmatively that the affiant is competent to testify to the matters stated in them. Authenticated copies of all papers or parts of papers referred to in an affidavit must be filed with the affidavit, unless they are already on file with the commission or are published and are generally available. If the moving party has reason to believe

that evidence in support of the motion exists and the moving party cannot with reasonable diligence obtain the evidence in proper form within the time allowed for filing the motion, the moving party may make a request in the motion for additional time to submit evidence. The request for additional time must be supported by an affidavit which describes as specifically as possible the evidence and the efforts that have been made and will be made to get it, and the time needed to obtain and file the evidence. The chairperson may grant additional time if the chairperson finds that the described evidence would be usable and helpful in passing on the motion and if the moving party has shown diligence in attempting to get it.

(5) Grounds for Removal. A member of a hearing tribunal shall be removed if the chairperson finds that the motion and supporting affidavits show that the person is disqualified under the law of this state on disqualification of judicial and quasi-judicial officers. Grounds for disqualification include:

(a) Prejudgment concerning issues of fact about parties in the particular case;

(b) Partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party, as distinguished from issues of law or policy;

(c) An interest whereby one stands to gain or lose by a decision either way;

(d) Any interest, pecuniary or not, the probable and natural tendency of which

is to create a bias in the mind of the person for or against a party; and

(e) That service of the person would cause the tribunal to appear to a reasonably prudent and disinterested person to lack the appearance of fairness, impartiality, and neutrality.

(6) Ruling on Motion. If the chairperson of the commission finds from the facts established by the motion and supporting affidavits that the tribunal member is disqualified, the chairperson shall issue an order removing the member from service on the tribunal.

(7) Limitations on Motions. No party and attorney for that party may make more than one motion for removal of the same tribunal member from the same tribunal, and no motion may be made after the tribunal member has made or participated in making any ruling involving discretion.

(8) Disposition of Denied Motions. In order to avoid a possible prejudicial effect on the tribunal member, a ruling denying a motion for removal shall not be revealed to the tribunal or its members by the chairperson or any representative of the commission. Motions and other papers filed under this section shall not be filed in the tribunal's case file or otherwise revealed to the tribunal or its members by representatives of the commission but shall be included in the record certified to superior court for purposes of appeal or enforcement, as is provided in WAC 162-08-231(5). Tribunal members

are directed not to examine files concerning them or the case, other than the tribunal's case file, during pendency of the hearing and are directed not to inquire as to whether a party or attorney has moved for removal of a tribunal member or alternate. Members of the public are requested not to reveal to a tribunal member the fact that a motion for removal has been made and denied. The procedure in this subsection is intended to establish a high standard of fairness, not a minimum standard of fairness. Knowledge by a hearing tribunal member about a motion for his or her removal shall not disqualify the member from continuing to serve, in the absence of evidence of actual bias arising from special facts. [Order 35, § 162-08-215, filed 9/2/77; Order 33, § 162-08-215, filed 3/21/77.]

WAC 162-08-217 Objection to manner of appointment. (1) Authorized. A party aggrieved by the manner in which a hearing tribunal has been appointed may file with the clerk a motion to the chairperson of the commission for an order setting aside the chairperson's order appointing the hearing tribunal, in whole or in part.

(2) Time for Motion. The motion must be filed within 15 days after the aggrieved party has been served with the notice of hearing.

(3) Grounds for Motion. The motion to set aside the order appointing hearing tribunal must be based on an error of law or procedure, other than appointment of a disqualified tribunal member or alternate, that invalidates the appointment of the entire panel of the tribunal, or of a member, members, or alternate. Each ground for the motion shall be specifically set out and supported by legal authority.

(4) Procedure. The motion shall be considered and decided as provided in WAC 162-08-271.

(5) Effect on Time of Hearing. The chairperson may postpone the time of hearing if the chairperson does not have time to dispose of a motion under this section before the scheduled hearing date.

(6) Where Filed. Papers filed under this section shall not be placed in the file of the tribunal hearing during the pendency of the hearing. If the case is brought to the superior court for review or enforcement, papers filed under this section

shall be included in the record certified to the superior court, as provided in WAC 162-08-231. [Order 33, § 162-08-217, filed 3/21/77.]

WAC 162-08-261 Complainant's participation. (1) Notice of Independent Appearance. A complainant who desires to submit testimony or otherwise participate in the hearing as a party and not to leave the case in support of the complaint to be presented solely by counsel for the commission, must serve and file a notice of independent appearance within ten days after the notice of hearing is served on that complainant. The notice shall state the address where notices to the complainant shall be sent and it shall state whether the complainant elects to prove additional charges as provided in paragraph (2) of this rule.

(2) Election to Prove Additional Charges. A complainant who has filed a notice of independent appearance stating an intention to do so may at the hearing offer proof of averments included in the original complaint or in amendments to the original complaint made by the complainant, whether or not the averments are included in the amended complaint under which counsel for the commission is proceeding. For purposes of this section, the complainant may amend the original complaint without regard to intervening amendments made by the commission. The complainant may serve and file an amended complaint with a notice of independent appearance, or thereafter as provided by these rules. If no amended complaint is served with a notice of independent appearance that states an intention to prove additional charges, the clerk shall promptly place the original complaint in the file for the hearing tribunal. Nothing done by the complainant under

this rule shall place any duty on counsel for the commission to seek to prove matters not averred in the amended complaint accompanying the notice of hearing, or subsequent amendments by the commission.

(3) Appearance Without Election. If the complainant files a notice of independent appearance which does not state that he or she elects to prove additional charges, then the complainant's participation in the hearing shall be confined to the matters raised by the amended complaint filed with the notice of hearing, and subsequent amendments made by the commission.

(4) When No Independent Appearance. If the complainant does not file a notice of independent appearance as provided by this rule, the case in support of the complaint shall be presented solely by counsel for the commission. [Order 35, § 162-08-261, filed 9/2/77; Order 7, § 162-08-261, filed 1/19/68.]